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Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT. SOCIETE INTERNATIONALE, ETC., IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 397

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the ALIEN PROPERTY CUSTODIAN, ET AL., *Petitioners*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., and ERIC G. KAUFMAN, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT, SOCIETE INTERNATIONALE, ETC., IN OPPOSITION

STATEMENT

The petition *properly* brings to this Court only a single question, namely, whether the district judge abused his discretion in refusing to modify an eight-year old order of reference entered by the late Chief Judge Laws upon a finding of exceptional conditions pursuant to Rule 53(b) of the Federal Rules of Civil Procedure.

Petitioners expressly committed their motion for modification to the discretion of the district judge and agreed that no question of validity of the order was involved. (See three remarks of petitioners' counsel at J.A.[1] 145, 146, 147, respectively; and two remarks of District Judge Pine at J.A. 150 in reliance thereon.) Petitioners' brief in the Court of Appeals presented the single question whether the district court had abused its discretion; and the majority opinion of the Court of Appeals addressed itself to that question, ruling in the negative (App. A to pet. p. 20).

Despite this background, petitioners seek in their "Question Presented" (pet. p. 2) to combine abuse and invalidity; and they suggest without basis on page 10 of their petition that the district judge did not purport to exercise discretion and that the Court of Appeals originated the "assumption" that petitioners' motion raised an issue of discretion.

ARGUMENT

There Was No Abuse of Discretion

On June 16, 1958, this Court vacated the judgment of dismissal and remanded this case to the district court (357 U.S. 197), indicating three alternatives which might be immediately pursued, one of which was for petitioners to propose and explore plans for fuller compliance with the discovery order.

Over two years and three months have elapsed since then, but petitioners have made no move in the direction suggested. Indeed, they have examined less than one-half of the approximately 250,000 Sturzenegger

[1] As to the petition, "J.A." when used in this opposition, refers to the joint appendix in the court below.

documents which have been tendered, and only in the spring of this year have petitioners made a start toward examining in Switzerland the books of the Sturzenegger Bank. (Compare, 357 U.S. 203.)

Despite the foregoing, petitioners convey to this Court the impression that there will be a substantial failure of production of relevant documents by this respondent, and that, therefore, a peculiar "kind of trial * * * has now become necessary as a result of supervening developments" (pet. p. 13). The plain fact is that petitioners are assuming a situation which they are not in a position to establish, and "for aught that appears"—to borrow their own phrase—may never occur. Apparently, petitioners, through inactivity or design, prefer to "cry 'wolf' " rather than to discover that nothing of importance is missing.

There is no substance to the claim that there has been a significant change of circumstances since the order of reference was originally entered. (See pet. pp. 12-13.) This point was not presented by petitioners to the district judge upon argument of their motion to modify the order of reference; and was merely alluded to nearly a month after the judge had announced his ruling and at a time when the parties appeared before Judge Dimock to settle the form of an order to implement his decision (J.A. 152-154).

In any event, the "drawing [of] inferences", which distuibs petitioners so much, is in the nature of a legal conclusion that the trial judge may, under Rule 53 F.R.Civ.P., re-evaluate. Ample latitude in this connection was recognized by the majority opinion of the Court of Appeals so as to assure petitioners that the ultimate decision at the trial level will be that of the

district judge and not that of the special master. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) and *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 217, 184 F.2d 245, 248, *cert. denied*, 340 U.S. 884 (1950).[2]

Moreover, the apprehension expressed on page 12 of the petition is one which really applies to respondent, and respondent is content to take its chances with the special master. The inferences which may be drawn from "absence of complete disclosure" would be *unfavorable* to this respondent, not to petitioners (357 U.S. at 213).

The majority opinion of the Court of Appeals clearly demonstrates that the district judge did not abuse his discretion when he refused to modify the order of reference. In reasoning toward this result, the Court of Appeals found the case at bar to be dissimilar to *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249. On the other hand, Judge Fahy in his dissent has misconceived Chief Judge Laws' "exceptional circumstances [conditions]" for ordering the reference. Contrary to the statement appearing at the bottom of page 8 of the petition, none of the reasons advanced by Judge LaBuy was even mentioned by the late Chief Judge of the District Court. Different and more potent ones exist here;[3] and petitioners are wholly inaccurate when they assert that the reference in *LaBuy* was sought to be justified "on precisely the grounds which were accepted by the court below" (pet. pp. 8-9).

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[2] This answers one of two points urged by Judge Fahy in his dissent.

[3] As the majority reasoned, "if ever there is to be a case" for such a reference as Rule 53 clearly authorizes, this is it. Surely, with all respect to Judge Fahy, "this is no *LaBuy* case", as the majority commented.

The late Chief Judge Laws was concerned with the exceptional situation brought about by many of the witnesses and practically all of the documents being located abroad.

This case involves the history of conduct and acts of human beings and corporations occurring in Europe beginning with approximately 1920 and coming up at least to the end of World War II. Particularly, there are involved the relationships of men in Germany connected with the old Frankfurt firm of Metaligesellschaft and with the huge I. G. Farben combine on the one hand, and, on the other hand, Swiss individuals and business enterprises whose pivot was the banking house of H. Sturzenegger & Cie., and its predecessor, Eduard Greutert & Cie., of Basel. The Swiss-German transactions fanned out into Holland, Norway, France, Poland and elsewhere in Europe. There will be involved in the case the testimony of upwards of a hundred witnesses and many hundreds of thousands of documents, virtually all located abroad.

Petitioners are urging that the exceptional conditions that Chief Judge Laws envisaged were limited to the pretrial stage of discovery of evidence and inspection of documents (pet. p. 10). Plainly, Chief Judge Laws was not thinking so narrowly. In the first paragraph of his order of reference, the judge referred to matters relating to the "trial" of the case (J.A. 74), and in the hearing of April 1, 1949 he mentioned that the special master could preside over the proceedings both in Europe and in the United States (J.A. 59). As the judge pointed out in the April 1949 hearing, it was impossible for a judge to go to Switzerland (J.A. 63), and the only person who could stay with the case

from the beginning to the end, wherever there was any kind of a proceeding, would be one occupying the role of a special master. (Compare J.A. 59.) He could make rulings on the spot relating both to time and subject matter; his presiding over the taking of a deposition for perpetuation purposes could, at the same time, dispose of the testimony also for trial purposes; and ruling upon the relevance of a document sought for discovery might also involve trial relevance.

The locale of this case for virtually every purpose is Europe, not America; and with rare exceptions, the witnesses for trial purposes will actually be testifying and referring to documents there and not over here. If the great bulk of evidence in a case is to be developed and assembled by the deposition process, as distinguished from the average case where depositions are the exception and not the rule, there is a real advantage to the trier of the facts to preside over the depositions and thus be able to observe the conduct and demeanor of the witnesses on the stand.

Moreover, Chief Judge Laws' attention was called to the first special defense of petitioners and to the vastness of the inquiries which would be made in connection therewith. (This appears at pp. 14-16 of the transcript of April 1, 1949,[4] included in the record filed in the Court of Appeals but not printed in the Joint Appendix.) The claimed ownership of the General Aniline shares by this respondent was and is under attack by the petitioners in this defense, and the acquisition transactions involving millions of dollars would have to be revealed or ferreted out by way of account-

[4] The substance of these pages is largely a quotation from petitioners' First Separate Defense, which appears at J.A. 48-49.

ing evidence. This is not a case like *LaBuy*, where accounting proof was ancillary to the determination of a principal issue; here, the question of ownership, as based upon intricate accounting transactions, is itself an issue.

In addition to the series of individual problems which Chief Judge Laws envisaged, he grasped the fact that with so much of the case destined to be resolved on European soil, there was a grave chance that it would get out of hand if it were not under the control of one who was free to go wherever something was happening and who would take with him a knowledge of everything which had happened before. Chief Judge Laws' overall concern for the myriad problems which were bound to arise in this two-continent litigation reached its zenith when he announced from the Bench in April 1949 that he was considering the appointment of a master because he was determined "to save the reputation of the courts and everybody else concerned" (J.A. 61).

All of these things continue to exist and will for a long time to come.

The grounds of the charge of abuse of discretion are neither substantial nor real. District Judge Pine aptly phrased the situation in the following (J.A. 150):

> "In addition, the master has acquired, over the years, an extensive familiarity with the case which would be forever lost if I granted the alternative motion [for modification] and this should weigh in the scales if defendants [petitioners here] are correct in their argument that the ruling of the Court on their motion involves the exercise of dis-

cretion. I, therefore, deny the motion for alternative relief."

Indeed, the special master has acquired a vast store of knowledge of personalities, facts and figures involved in the case. Judge Pine recognized this in the foregoing, and wisely apprehended that it "would be forever lost" if he granted petitioners' motion (J.A. 150). Thus, harm could come to the case itself—that is, to its expedition, efficient handling and judicial acquaintanceship, and this obviously was an important consideration in the exercise of discretion by the district judge, even assuming *arguendo* that, as claimed on page 11 of the petition and as mentioned by Judge Fahy in his dissent, the functions of the special master have been thus far confined to the supervision of discovery proceedings and depositions.[5]

In undoubted exercise of a sound discretion not to modify the order of reference, Judge Pine employed the following phrases: that if he modified the order he would be "changing the rules in the middle of the game"; that the "whole pattern of the proceedings" would be changed and would "cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize"; and that "too much water has gone over the dam to justify such a modification now" (J.A. 150).

[5] While it may be true that the master's functions have been thus limited insofar as this respondent's cause of action is concerned, his functions with relation to the intervenors have involved substantial questions of substance and procedure. (See intervenors' briefs in opposition.) Moreover, in presiding over a deposition that encompasses more than 6,000 pages, the master had the opportunity to observe factually the gamut of the case. (This deposition is referred to on page 4 of the petition.)

CONCLUSION

It is clear that what District Judge Pine decided was that he found no reason, either in law or in fact, which should prevail upon him to terminate or modify the reference order, and that everything presented to him was to the contrary. This respondent submits that the district judge is completely supported in this conclusion, and that nothing stated by petitioners even remotely approaches the charge of abuse. Judge Pine did not hold that he could not terminate or modify the reference order (see pet. p. 13); what he decided was that he found no reason to do so. Moreover, the Court of Appeals' ruling is in no sense in conflict with a controlling decision of this Court. The petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

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October 8, 1960

[6] Understandably, petitioners do not maintain that the writ should be granted because the lower courts took the appropriate steps for the prosecution of an interlocutory appeal under 28 U.S.C. 1292(b).